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# Judicial Selection by the Numbers

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# JUDICIAL SELECTION BY THE NUMBERS

MICHAEL J. GERHARDT\*

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## I. INTRODUCTION

The lure of doing empirical research in legal scholarship is strong, but the appeal of critiquing judicial selection is stronger. So it is rather surprising that empirical analysis figures very little in the voluminous legal commentary on judicial selection. Instead, legal scholars devote little attention to the actual numbers in judicial selection; they generally defer to, or merely accept, the empirical work

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\* Arthur B. Hanson Professor of Law, William & Mary Law School; Visiting Fellow, James Madison Program in American Ideals and Institutions, Princeton University, Spring 2004. I am grateful to Scott Baker and Mitu Gulati for helpful comments on an earlier draft. My contribution to this Symposium is an expanded version of my essay entitled *Merit vs. Ideology*, 26 CARDOZO L. REV. 353 (2005).

done by others, particularly social scientists, on judicial selection. While some of these studies are excellent,<sup>1</sup> many have problems. In this Essay, I explore three basic challenges to doing empirical studies of judicial selection and suggest ways to meet these challenges. My hope is to give some useful guidance to legal scholars and others interested in developing a more sophisticated understanding of the judicial selection process through empirical analysis.

The first challenge, discussed in Part II, is defining merit. Many legal scholars rarely discuss merit in their commentaries on judicial selection, even though developing a coherent notion of merit is essential for evaluating the quality of judicial nominations. Consequently, in Part II, I examine the empirical challenges posed by several plausible definitions of merit. This discussion should help to illuminate, *inter alia*, the importance of merit as a normative criterion for judicial selection as well as the significant relationship between merit and the one thing almost all commentators assume is a principal driving force in judicial selection: Ideology, by which I mean precommitments to certain outcomes or approaches for analyzing constitutional issues, regardless of the facts of particular cases.

In Part III, I examine the benefits of avoiding the popular practice of labeling judicial nominees on the bases of their supposed ideologies. Politicians and social scientists share a strong proclivity to pigeonhole judges and Justices based on their supposed ideologies, but their labels tend to be overly simplistic, inaccurate, incomplete, misleading, and value-laden. They tend to obscure, if not ignore, the subtle differences in judicial philosophies as well as the basic fact that some Justices and judges do not have fixed ideologies either at the time of their initial appointments or perhaps ever. Moreover, because of ideological drift (and other factors), the categories scholars and others use in analyzing judicial performance are not static. Perhaps the most serious problem with labeling is that it obscures the middle, or the mainstream, in American constitutional jurisprudence. Politicians fight to place their nominations within the mainstream for a reason: It provides a benchmark against which to measure politicians' and others' characterizations of judicial performance. Each side strives to include its nominees within the mainstream and to push the other side's outside of it. Moreover, each side has a strong incentive to push the envelope in confirmation proceedings, because it will help expand the safe ground available to its nominees but

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1. See, e.g., SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997); Lee Epstein et al., *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903 (2003).

situate the other side's nominees closer to, if not beyond, the outside of the mainstream.

In Part IV, I explore possible empirical tests for determining the relative impacts of almost a dozen factors on the fates of judicial nominations. These recommendations will help legal scholars (and others) move beyond their unfounded assumptions about the forces driving federal judicial selection and be more precise with the terms they employ for characterizing judicial qualifications or performance. While it may never be possible to bridge the divide among national political leaders on such basic things as defining merit or ideology in judicial selection, empirical research at least holds the promise of illuminating common ground for those outside the process to evaluate what happens inside of it.

## II. MERIT

In this Part, I examine a basic question that presumably is of great interest to everyone concerned with the quality of judging: How do we measure fitness for office and, particularly, how do we determine who are the best qualified people for appointment to the U.S. Supreme Court, the U.S. courts of appeals, and U.S. district courts? There are several possible definitions of merit, each of which poses a challenge for empirical analysis of judicial selection. I discuss several possible definitions of merit and the respective empirical challenges posed by each of them.

### A. *The Conventional, Elitist Definition of Merit*

One way to define merit is simply to examine how it has been defined in the past. A review of the critical literature on merit indicates that, as a descriptive matter, critical elites have always defined merit to suit their own purposes.<sup>2</sup> Different sectors and professions develop their own, self-serving conceptions of merit. With respect to judicial appointments, there has never been some objective, or neutral, criterion of merit. Instead, the governing elite has made judicial appointments to further its own interests. Consequently, merit is defined so as to allow for, if not to maximize, the appointments of relatives, friends, and especially political allies.<sup>3</sup> For any given presidency or era, the essential tasks are to figure out the conception of merit advanced by the governing elite and how well nominees fit this

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2. See, e.g., Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363 (2003) (noting that President Reagan employed a conception of merit based in large part on adherence to the doctrine of original understanding).

3. Cf. KERMIT L. HALL, *THE POLITICS OF JUSTICE* (1979) (describing the use of patronage in federal court appointments between the years 1829-1861).

particular conception. It has been quite common for Presidents to choose judicial nominees who not only share their constitutional vision but are also likely to be supportive of their administrations' policies. For instance, President George Washington chose his judicial nominations based in part on their support for the ratification of the Constitution and commitment to Federalist ideals,<sup>4</sup> while President Lincoln opted for judicial nominees who supported the Union and Reconstruction.<sup>5</sup>

There are, however, three major problems with relying on an instrumental conception of merit as an empirical measure of the quality of judicial nominations. First, the conception is unstable. It changes at least as often as the governing elite does. For instance, President Reagan, from 1980 through 1986, employed a conception of merit that included rigid commitment to original understanding.<sup>6</sup> Once Democrats took control of the Senate in 1986, the pressure mounted on President Reagan to moderate his definition. He soon did: After his first two nominations to replace then-retiring Justice Powell failed, President Reagan modified his conception of merit to settle on someone with more moderate views, Anthony Kennedy. President George H.W. Bush might have been disposed to employ the same definition of merit adopted originally by President Reagan. But facing a Democrat-controlled Senate, with a majority hostile to rigid commitments to original understanding, President Bush chose a candidate without a paper trail on ideology—David Souter—to replace then-retiring Justice Brennan.

Second, it is a mistake to assume the governing elite is candid about its conception of merit. In some cases, governing elites are not forthcoming—and some might go so far as to suggest they are deceptive—about their conception of merit. President George W. Bush insists that merit is his principal selection criterion, but he has never given a detailed definition of his conception of merit. Nor does merit, however defined, seem to explain all his judicial nominations. For instance, President Bush twice nominated and eventually made a recess appointment of Charles Pickering, Sr., to a seat on the U.S. Court of Appeals for the Fifth Circuit, though Pickering was the most reversed district judge in his circuit. It is hard to explain Pickering's appointment as based on some objective criterion of merit.

Third, the governing elite's definition of merit works very poorly as a normative criterion. Using each administration's definition of merit to evaluate its nominees allows *it*, not any external or inde-

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4. See HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 53-60 (new & rev. ed. 1999).

5. See *id.* at 86-92.

6. See, e.g., Johnsen, *supra* note 2.

pendent source, to define the terms on which they may be measured. Each administration's definition of merit is likely to be self-serving, so in all likelihood it would be a rare case—perhaps like Pickering's nomination—that does not fit within its definition of merit. The less precise an administration is in defining merit, the easier it will be to show that its nominees satisfy it. Thus, it is conceivable that even Pickering can be defended as a merit appointment on *some* grounds, such as his longstanding experience as a district court judge and the respect that he has earned from the lawyers appearing before him as well as the members of local and state bar associations. Yet, the less precise an elite's definition of merit, the less useful it becomes as a normative criterion, because it is not stringent enough to rule anything out. Moreover, it would be extremely unfair to use one governing elite's definition to measure the quality of an appointment made by a different governing elite, because they will have been likely defined in opposition to each other. President Reagan's definition of merit, for instance, was deliberately designed to contrast with the appointments of his Democratic predecessors as well as the politically moderate Gerald Ford. He chose his definition in part because it ruled out the likelihood of choosing people like those nominated to judgeships by Ford or Presidents Johnson and Carter.

Thus, the elite's definitions of merit are of limited relevance to empirical research. To be sure, they may be useful for clarifying a particular administration's expectations of its nominees. But elitist definitions of merit are unlikely to be useful in satisfying more ambitious empirical objectives. Empirical research requires developing criteria with more explanatory potential and normative value.

*B. The Public as Arbiter of Merit: Social Scientists Do Not Have a Uniform Conception of Merit*

Some agree that merit is a purely instrumental concept. Perhaps the most aggressive advocates of this conception are Harold Spaeth and Jeffrey Segal. They argue that judicial selection is not based on any neutral conception of merit. Instead, they claim, Supreme Court Justices reflect the values, or preferences, of the governing elite.<sup>7</sup> They are chosen, in other words, because they are likely to uphold the values and preferences of the people who appoint them. Understanding judicial selection in this manner helps explain why Supreme Court Justices never stray far from standing behind the policies or cultural beliefs of the people who appointed them. Instead, Segal and Spaeth argue, Justices are picked on the basis of their

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7. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86-97 (2002) (describing judges as motivated in their decisionmaking primarily by personal policy preferences).

likely ideologies with respect to social policy. Once on the bench, they merely vote their policy preferences.

Many other social scientists take contrary viewpoints on merit. They believe that in empirical research it is important to ground a conception of merit in a source independent from, or external to, the actual judicial selection process. An external definition of merit is useful normatively, because it provides an arguably neutral benchmark detached from an actual Justice's selection against which to measure his or her qualifications and performance. For instance, social scientists sometimes use the public as an external source for defining merit. This definition allows researchers to measure judicial selection against public opinion.

In this Symposium, Lee Epstein and her coauthors suggest a variation on this approach. They suggest the media as one possible evaluator of merit.<sup>8</sup> They consider merit as simply being whatever the media has defined it to be. This is, however, a problematic measure for several reasons. First, it is unclear why the media should be regarded as neutral on this matter. Indeed, many thoughtful people believe that the media is not neutral. They believe that the media has its own ideological agenda, which is likely to influence its coverage of events and its evaluations of the merits of judicial nominees. For instance, it is hard to imagine that *The Wall Street Journal* editorial page or the Fox News Network will seriously question President Bush's declarations about the merits of his judicial nominees.

Second, the media has no apparent interest in being or becoming a neutral arbiter of merit. There is no good reason to believe that the media has the public interest at heart and thus can be fairly or sensibly viewed as acting on its behalf. By all accounts, the media loves to cover scandal and conflict. The need for the media to make money, coupled with intense competition arising from the twenty-four-hour news cycle and the Internet, has exacerbated the declining interest in simply reporting the hard news—that is, facts and figures.<sup>9</sup> The media increasingly prefers to report soft news—that is, speculation and commentary.<sup>10</sup> Drama is likely to attract reader or viewer interest, and so the media increasingly reports as much drama as it can. A neutral assessment of merit, if it were to be made at all, is likely to be lost in the avalanche of soft news that dominates media reporting. Moreover, many commentators are not lawyers, and many of the

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8. Lee Epstein et al., *The Role of Qualifications in the Confirmation of Nominees to the U.S. Supreme Court*, 32 FLA. ST. U. L. REV. 1145 (2005).

9. See Stephen Hess, *Media to Government: Drop Dead*, BROOKINGS REV., Winter 2000, at 28 (suggesting that news coverage of and public interest in politics has declined).

10. See, e.g., MARVIN L. KALB, ONE SCANDALOUS STORY: CLINTON, LEWINSKY, AND THIRTEEN DAYS THAT TARNISHED AMERICAN JOURNALISM (2001); BILL KORACH & TOM ROSENTIEL, WARP SPEED: AMERICA IN THE AGE OF MIXED MEDIA (1999).

ones who are lawyers are unlikely to be neutral—they are likely to be fierce combatants for one extreme viewpoint on a nomination.

Third, the media lacks any expertise in evaluating merit. It is unclear why it should be supposed that the media generally has any special insight into the qualifications for judicial service. Some commentators have law degrees and may have practiced law or served in government; however, most are not trained as lawyers. Moreover, many professions evaluate merit based on the assessments of those within the profession. Some quickly write this off as merely a custom or price of admission into a particular guild. While it may be true that professionals are not necessarily the only ones who can evaluate what they do professionally, it does not follow that professionals are ill equipped to evaluate each other's professional performance. Thus, yet another important empirical study to undertake is measuring the extent to which a particular profession, such as legal practitioners or judges, is well equipped to evaluate its own practitioners.<sup>11</sup>

### *C. Assumptions on Which Most People Agree*

One possible reason legal scholars do not discuss merit is because most of us—indeed, perhaps most people—share a number of assumptions about merit in judicial selection. It is possible that with respect to merit we might have more consensus than generally acknowledged. Thus, it is important to consider the assumptions about merit on which there may be substantial if not uniform agreement. Below, I consider two different ways for illuminating such assumptions and the problems with empirically demonstrating each, particularly separating merit from ideology.

#### *1. Imagining the Ideal Judicial Nominee*

Imagine, for a moment, that you have been asked by the President to draft a list of qualifications for nominees to the Supreme Court and to other Article III courts. Imagine further that you do not know which particular President has made this request. You are, in other words, behind a Rawlsian veil of ignorance,<sup>12</sup> for you do not know anything particular about whether this will ultimately help or hurt you, what kinds of cases will likely come before the courts, the President's party, and the composition of the Senate. Is it possible to draft such a list, and if so, what qualities would be on the list? Below, I consider five possible qualities that could conceivably satisfy our collective assumptions about merit.

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11. Cf. Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299 (2004).

12. JOHN RAWLS, *A THEORY OF JUSTICE* § 24 (rev. ed. 1999).



*(a) Professional Experience and Accomplishments*

It is easy to see the importance of meaningful, first-hand professional experience to judicial selection. We want our judges and Justices to be familiar with the business and responsibilities of the courts to which they have been nominated. We do not want appointees to need on-the-job training. The ideal is someone whose experience specially qualifies her or him for judicial appointment.

The requisite experience might not be the same for every Article III court. Presumably, the ideal experience for a Supreme Court Justice is practicing before the Court and perhaps serving in other offices, such as lower court judgeships, that employ similar (but not identical) skills. Meaningful experience might also include serving in a significant public office, for it might enrich the nominee's understanding of the system from which the laws appealed to her Court will come. Rich professional experience is bound to sharpen nominees' judgments and provide a solid foundation from which to approach the significant legal questions that come routinely before the Supreme Court.

The ideal experience for a federal court of appeals judge is substantial appellate practice or prior service as a judge on a comparable court or perhaps on a federal trial court. Meaningful experience might also include demonstrated or proven expertise in some areas of the law. The ideal may be that the leading practitioners or scholars in different fields would bring their respective expertise (and the skills that allowed them to develop it) to the task of judging.

The ideal experience for a district judge is substantial trial experience. Not all trial lawyers will make good district judges, but all good district judges presumably understand how to manage trials of all shapes and sizes and large caseloads. The ideal experience may also include service as a judge on a comparable court, such as a state supreme court.

Demonstrating empirically the extent to which judicial nominees have, or deviate from, ideal experience should not be difficult. We already have considerable data on the professional backgrounds of the people nominated to judgeships. For instance, we have the rates of affirmance and reversal for sitting judges. We can also count years devoted to legal practice and determine the relative weight to be assigned to the professional work nominees did prior to their nominations. Judicial nominees' professional experience need not have been in the public sector, but the more firsthand experience with the legal system a nominee has, the better. We could assign more weight to public service experience, but we need not discount entirely other professional experience. Furthermore, we could measure familiarity

with the legal system based on the data gathered by bar groups or those who have worked closely with the nominees.

(b) *Legal Acumen*

We expect judicial nominees to have very high degrees of legal acumen. We expect judicial nominees to be highly intelligent, perhaps to have performed quite well in law school, maybe even to have attended an elite law school. At the very least, we would want to make sure that the nominee has very sound legal skills; is capable of asking intelligent, probing questions; thinks critically (if not imaginatively) about legal problems; identifies legal issues in a wide range of problems; is trained at problem-solving; is diligent; and understands the special duties that she will be called upon to discharge.

Measuring this criterion entails coordinating different data. There will be some objective data (such as the law school attended or the number of law review articles written) and some subjective data (such as measuring the opinions of the bar or those who have practiced before or with the nominees).

(c) *Judicial Temperament*

We expect judicial nominees to have excellent judicial temperament. The ideal temperament for a judge or Justice is presumably to have the capacity to make decisions evenhandedly, to be open-minded in listening to and considering the arguments in the cases that come before him, and to be respectful to litigants and other appellate judges or Justices with differing opinions. A district judge may largely work alone in deciding cases but still needs a great deal of patience to sit through long trials and other legal proceedings. Moreover, a good judicial temperament requires, of course, a disposition to follow the law. Judicial nominees need, in other words, to demonstrate in some ways that they are well suited to resolving legal disputes rather than rewriting the laws they are interpreting. Judicial nominees also need to be able to handle the intense pressures that come with the responsibilities of being judges or Justices.

Collegiality is a related measure of ideal judicial qualifications.<sup>13</sup> Collegiality requires getting along with the other Justices or judges with whom one must work. Collegiality also entails being able to build coalitions and to maintain cordial relations with other judges or Justices, regardless of the extent to which one may agree or disagree with their views in particular cases. Maintaining cordial relations is

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13. On the importance of collegiality, see Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003); and Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335 (1998).

no mean feat on the Supreme Court, which Justice Holmes once described as “nine scorpions in a bottle.”<sup>14</sup> Not all people who must work together in relatively close quarters successfully maintain respect and civility over long periods of time, but the ideal nominee must have this capability.

Empirically demonstrating excellent judicial temperament or collegiality is not easy. To be sure, if nominees have had lots of verified complaints filed against them for temperamental outbursts, those would be signs of problems with temperament. If the complaints come from other judges, they undoubtedly will call into question a nominee’s collegiality. Moreover, taking temperament or collegiality into account invites unsubstantiated rumors or insinuations from critics. Measuring nominees’ collegiality or temperament thus requires sorting fact from fiction. It requires, in other words, developing credibly neutral measurement.

#### *(d) Writing Skills*

Yet another criterion for the ideal nominee is excellent writing ability. This is particularly true for Supreme Court Justices and federal appellate judges, who are called upon to draft large numbers of opinions. The ideal Supreme Court or federal court of appeals nominee should be able to write clear, coherent opinions. It is especially important that the ideal nominee have the ability to craft opinions reflecting multiple viewpoints. Moreover, it is important for the nominee to be able to compose opinions relatively quickly given the time pressures under which judges and Justices operate.

Measuring writing ability involves both objective and subjective data. The objective data include judges’ productivity and the amount of time it takes for judges to produce opinions, particularly as compared to the other judges with whom they regularly sit. The extent of a nominee’s nonjudicial writings may also be pertinent. It reflects, *inter alia*, their contributions (if not their leadership) in refining our understandings and reforms of different areas of the law. Subjective data include the quality of a nominee’s writings and speeches. The quality of the latter depends on the assessments of others, including, but not limited, to peers and experts.

#### *(e) Integrity and Character*

Integrity is essential to the ideal judicial nominee. A judicial nominee’s integrity must be beyond question in order for her or him

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14. *E.g.*, MAX LERNER, NINE SCORPIONS IN A BOTTLE: GREAT JUDGES AND CASES OF THE SUPREME COURT (Richard Cummings ed., 1994); Richard A. Posner, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 13, 14 (1990) (attributing this statement to Justice Holmes).

to exercise the fragile moral authority of a Supreme Court Justice, federal court of appeals judge, or district judge. Judges and Justices embody the law, and they need to comply with the very laws they expect others to follow. If nominees have not followed the laws they expect others to follow and for whose violations they may sentence other people, they no longer can claim the special moral status on which their job depends.

Closely related to nominees' integrity is their moral character. Stephen Carter and Larry Solum are just two of the many scholars who insist that a Supreme Court Justice ought to have a strong, moral character.<sup>15</sup> At the very least, having a strong, moral character means having the courage of one's convictions and the strength not to alter one's opinions, or decide cases, for the sake of public or peer esteem.

Integrity and character are easier to measure in their absence than they are positively. For instance, criminal convictions would almost certainly disqualify someone from judicial appointment, though it is conceivable that if the crimes were misdemeanors and committed many years before the nominations they might be dismissed as irrelevant. Admissions or proof of wrongdoing further demonstrate problems with integrity or character. The fact that Justice Fortas continued after his appointment to give policy advice to President Johnson raised a question about his professional judgment.<sup>16</sup> Even worse, his accepting money from a convicted mobster was an ethical lapse,<sup>17</sup> just as it is unethical for a judge or Justice to rule on cases involving former clients or companies in which he or she owned stock. Complaints made by spouses or children in custody disputes might raise questions about nominees' characters; even if no criminal conduct were alleged, charges might be raised about the person's moral judgment.

In the absence of documentation, integrity and character are established through subjective data. They will be based largely on testimonials from other people. Senators tend, however, to give more weight to negative appraisals. Because most nominees receive positive testimonials, the latter end up not receiving much attention unless they have come from people whose opinions carry great weight with Senators. In contrast, negative testimony draws much greater

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15. See STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 151-55 (1994); Lawrence B. Solum, *A Tournament of Virtue*, 32 FLA. ST. U. L. REV. 1365 (2005).

16. For an account of these interactions, see LAURA KALMAN, *ABE FORTAS* 310-18 (1990).

17. For an in-depth review of the events, see ROBERT SHOGAN, *A QUESTION OF JUDGMENT: THE FORTAS CASE AND THE STRUGGLE FOR THE SUPREME COURT* (1972).

attention. It makes headlines, provokes lots of questions, and raises potentially fatal doubts.

*(f) Other Factors*

There are other qualifications that ideal nominees arguably need to satisfy. Besides the factors already mentioned, Presidents might also be interested in nominees' religion, ethnicity, gender, and health. These other factors might be important in diversifying the composition of the federal courts or satisfying underrepresented segments of society. Moreover, nominees' ages have been very important to some Presidents who wanted to ensure that their appointees could continue to serve as judges and Justices long after they left office.

*(g) Empirical Complications*

Of course, the criteria that are relevant for determining ideal nominees are one thing, while the things at which Presidents or their advisers might look in order to measure actual nominees are quite another. The values of those charged with selecting a nominee will inevitably influence what they choose to look at and how they will perceive it. Moreover, it might simply be unrealistic—or reckless—to ignore factors such as timing, the President's party, the composition of the Senate, the nominee's political or party affiliation, or the compositions of individual federal courts. For instance, the composition of the Senate might be quite pertinent to a Supreme Court nominee's chances of confirmation. Indeed, a President might be inclined to choose different people, depending on whether his party controls the Senate or whether the minority has enough members to filibuster a contested nomination. Certain factors are bound to complicate the nominating process. For instance, the proximity of the next presidential election cannot be ignored, since the opposing party has successfully rejected or delayed more than a few Supreme Court nominees in the hope of preserving the vacancies for Presidents from their party.<sup>18</sup> And we have not yet mentioned a nominee's likely ideology or how well a potential candidate interviews for the job as possible complicating factors.

Nor have I yet acknowledged other, arguably more serious problems with collective assumptions about merit. First, we still have to demonstrate empirically our collective assumptions about merit. It is one thing to assume we share some consensus on merit, but we need to show precisely what, if anything, our shared assumptions are. This requires figuring out whose opinions ought to count and how to

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18. See ABRAHAM, *supra* note 4.

figure them out. Second, even if there were shared assumptions about merit, there may not be any consensus on what kinds of activities or data satisfy our shared criteria for merit. For instance, it is possible there is relatively widespread consensus on the relevance of professional experience to judicial selection but not on which experiences ought to count or on the relative weight (or relevance) of different kinds of experience (say, public defender versus federal prosecutor). Third, there may not be any consensus on the relative weight of different factors, such as experience and judicial temperament. People might have reasonable differences of opinion about how to prioritize different factors or whether one factor ought to count more than another. Nor may there be any consensus on the significance of an absent factor or how much weight to attach to a negative rating with respect to a particular criterion, such as judicial temperament. Again, people might have reasonable differences of opinion about what needs to be shown in order to disqualify a nominee altogether.

The large number of potential considerations helps to explain why some Presidents, or their advisers, might prefer to break the nominating process into first- and second-order selection criteria. The first might allow for a relatively sizeable list of potential candidates, while the second might be used to cut the list down to size (if not down to one). Interviews might be used to cut a narrowed list even further (at which point, of course, a great deal depends on who is doing the interview, the questions asked, and the nominees' responses).

It is possible that recognizing the large number of potential considerations discourages academics from pondering the qualifications of ideal nominees to the Court and other Article III courts. Academics might view such an exercise as futile, for they appreciate that judicial nominees are not chosen in vacuums. Yet neither Senators nor academics hesitate to evaluate nominees, particularly those to the Supreme Court, on the basis of some criteria. The question thus remains as to the appropriate criteria for measuring the quality of a particular nomination. Of course, the fact that a nomination falls short of an ideal is not necessarily an argument against it. Supreme Court nominees usually enter the confirmation phase with at least a presumption, or likelihood, that they will be confirmed.<sup>19</sup> It thus usually takes some rather significant things—not just some deviation from an ideal—to put nominations in trouble. Nevertheless, the stronger nominees' credentials (or the more closely they approximate an ideal), the tougher it may be to undermine their nomination. Thus, looking at another way to determine ideal credentials

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19. See Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL'Y 467, 479-81 (1998).

might be fruitful for providing at least one significant measure for evaluating the relative strengths of particular nominations.

## 2. *Determining Merit in Reverse*

Part II.C.1, *supra*, examined possible judicial selection criteria on which there might be consensus. This section considers determining qualifications by looking at merit in reverse. It considers whether it is possible to infer from the Justices we might generally agree were “great” or “excellent” what they might have had in common prior to their appointments. The question is whether the signs of at least potential “greatness” or “excellence” were evident at the times of the appointments of Justices who later proved themselves to be first-rate Justices.

I illustrate this tack through two examples. The first is Justice Benjamin Cardozo. His name appears on most lists of great Justices,<sup>20</sup> so the question naturally arises whether, or in what ways, Justice Cardozo’s greatness or excellence was evident at the time of his nomination. Throughout his career—first as a lawyer specializing in appellate briefs (from 1891 to 1913), then as a judge (since 1914) and later chief judge (since 1926) of the New York Court of Appeals—Cardozo, nominally a Democrat, had enjoyed the confidence of all political factions.<sup>21</sup> Achieving this level of confidence was especially significant because he had done it in an era when state courts (and his court especially) were widely revered. Cardozo was also the author of several highly regarded books and had received honorary degrees from many universities, including Yale, Columbia (his alma mater), and Harvard.<sup>22</sup> Many of his decisions in such areas as torts and contracts influenced judges and courts throughout the nation. Thus, he evidently had, by the time of his appointment, compiled ample judicial experience, shown considerable legal acumen, and demonstrated excellent judicial temperament, collegiality, and leadership on a leading court. At the time of his appointment, Cardozo’s integrity and character were beyond reproach.

My second example involves another New Yorker, Charles Evans Hughes, whom many believe was a first-rate jurist (not once but twice!).<sup>23</sup> When Hughes was first nominated and confirmed to the

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20. See, e.g., LEADERS OF THE PACK: POLLS & CASE STUDIES OF GREAT SUPREME COURT JUSTICES 10-12 (William D. Pederson & Norman W. Provizer eds., 2003) [hereinafter LEADERS]; Albert P. Blaustein & Roy M. Mersky, *Rating Supreme Court Justices*, 58 A.B.A. J. 1183, 1183 (1972); see also RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* (1990).

21. See ANDREW L. KAUFMAN, *CARDOZO* (1998) (detailing Cardozo’s legal career).

22. For a brief account of Cardozo’s legal training at Columbia, see *id.* at 40-50.

23. See LEADERS, *supra* note 20, at 187-88.

Supreme Court in 1910, he already had outstanding credentials.<sup>24</sup> He had been an active practitioner with one of the leading law firms in the country, been a leader of the New York and national bars, and devoted himself to substantial public service. At the time President Taft appointed Hughes as an Associate Justice, Hughes was serving with distinction as the Governor of New York. As an Associate Justice, Hughes authored a number of significant opinions, demonstrated respect for his colleagues and opposing arguments, and displayed an evenhanded temperament. After leaving the Court six years later to run unsuccessfully for President of the United States,<sup>25</sup> he served as president of the American Bar Association;<sup>26</sup> argued several cases successfully before the Supreme Court (and performed significant pro bono work); served for four years as Secretary of State under Presidents Harding and Coolidge (1921-1925);<sup>27</sup> and served on the Permanent Court of International Justice, or World Court (1928-1929).<sup>28</sup> Few nominees to the Court have ever matched Hughes' record of public service prior to either of his appointments to the Court, and fewer had records of public service that commanded the respect of the leaders of both parties (though this did not save him from having a significant minority of Senators vote against his nomination as Chief Justice for fear of his allegiance to big business<sup>29</sup>). Hughes brought statesmanship to the task of judging.

My point is not to suggest that either Cardozo or Hughes ought to be the ideal model of a Supreme Court Justice or Chief Justice. Rather, my point is that if we are sincerely interested in measuring merit, we might consider inferring from certain nominees' records, during their respective appointments, appropriate criteria for meritorious appointments to the Court. But we rarely do. This may be because we rarely take merit into consideration without some reference to ideology. Many, if not most, of us might suspect that most Presidents and Senators are preoccupied with ideology in assessing judicial nominees. Consequently, we need to consider the implications of the linkage of merit to ideology in the federal judicial selection process.

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24. See SAMUEL HENDEL, CHARLES EVANS HUGHES AND THE SUPREME COURT 1-15 (1951).

25. See *id.* at 68-71.

26. 2 MERLO J. PUSEY, CHARLES EVANS HUGHES 587 (1951).

27. HENDEL, *supra* note 24, at 74-77.

28. 2 PUSEY, *supra* note 26, at 640-47.

29. HENDEL, *supra* note 24, at 78-90 (discussing the debate over Hughes's nomination to the position of Chief Justice).



*D. Assumptions on Which Few People Agree*

A fourth way to define merit is through assumptions on which few people agree. It is possible that many, or even most, of us might agree that ideology is pertinent to judicial selection, though we might not agree on the particular ideology that we would prefer for judicial nominees to have.

Indeed, no one seriously thinks that President George W. Bush has been using the same criteria that President Clinton employed in choosing which people to nominate to district and circuit court judgeships. Instead, we strongly suspect (based on leaks and outcomes) that President Bush is considering different sets of people from those that President Clinton considered nominating as judges. The differences in their nominees go beyond party affiliations or allegiances; they reflect differences in experience, political commitments and service, and attitudes about how to decide constitutional cases. These attitudes are what some people might call ideological commitments.

Yet it is reasonable to wonder whether there are any selection criteria on which Presidents Bush and Clinton (or their respective advisers) would agree. (Presidents Clinton and Bush apparently did agree on two nominees—Judges Roger Gregory and Barrington Parker, Jr.—whom they nominated and who were ultimately confirmed by the Republican-led Senate in 2001.<sup>30</sup>) Presidents Clinton and Bush (and their supporters and advisers) each have claimed that they nominated the *best-qualified* people as federal judges, but these claims beg the question: how do we determine merit, or who are the best-qualified people for judicial appointments? It is not immediately clear why or how both Presidents could be appointing the best-qualified people given that they appear to have been nominating quite different kinds of people to judgeships—people with different backgrounds, political experience, party affiliations, sponsors, and attitudes.

Given these circumstances, a typical refrain from scholars is to insist that ideology matters, because it frequently makes the critical difference in whom the President nominates or whom the Senate confirms to Article III courts, and thus we need to focus on the likely ideologies of judicial nominees in evaluating whether they ought to

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30. In his final year in office, President Clinton nominated Roger Gregory and Barrington Parker, Jr., to the U.S. Court of Appeals for the Fourth Circuit and for the Second Circuit, respectively. The Senate never acted on those nominations. Consequently, President Clinton in his last month in office designated both nominees as recess appointees to their respective courts of appeals. These appointments would have expired at the end of the next congressional session. However, in March of his first year in office, President George W. Bush announced his first set of nominees to the federal courts of appeals, including Gregory to the Fourth Circuit and Parker to the Second Circuit. David G. Savage, *Bush Picks 11 for Federal Bench*, L.A. TIMES, May 10, 2001, at A1.

be confirmed. Walter Dellinger's proposed solution to the impasse over some of President Bush's judicial nominees has the distinct virtue of smoking out whether ideology is what matters most to each side.<sup>31</sup> He proposes that each President ought to agree to nominate at least one of a preselected few people approved by the opposition party in exchange for a relatively smooth confirmation process for every three or four people he prefers to appoint to a particular circuit court of appeals. For instance, in exchange for his getting Miguel Estrada, Bret Kavanaugh, and Tom Griffith appointed to the U.S. Court of Appeals for the District of Columbia,<sup>32</sup> President Bush would be obliged to nominate someone from a group of potential nominees approved by the Democratic caucus in the Senate. If the President were to refuse, Dellinger argues, then it can only be because he clearly prefers to zealously protect his prerogative to take ideology into account in nominating judges.

Dellinger poses a powerful test of presidential commitment to ideological criteria for judicial nominations. Nevertheless, it is possible that Presidents may zealously protect their nominating authority (as did, for instance, Presidents Tyler and Madison in the nineteenth century<sup>33</sup>) for reasons other than the desire to ensure the ideological purity of their judicial nominations. Presidents may wish to preserve their autonomy to nominate people to judgeships for such other reasons as rewarding personal or party fealty, currying the favor of particular Senators or constituencies, and broadening the diversity of the federal judiciary. Of course, none of these reasons for appointment is mutually exclusive from fulfilling certain ideological criteria. It is possible that Presidents, or at least their advisers, might define merit as an additional criterion for nomination or perhaps as the critical factor for choosing among potential nominees or for determining the potential sets of nominees for particular judgeships. Indeed, some Presidents, or their advisers, might define merit as including a particular ideological orientation with respect to constitutional interpretation. It is not unprecedented by any means for Presidents to select people as nominees based on the extent to which the nominees conform to the presidents' notions as to the duties they expect judges or Justices to perform. President Reagan, I suggested earlier, seems

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31. Walter Dellinger, *Broaden the Slate*, WASH. POST, Feb. 25, 2003, at A23.

32. Miguel Estrada, Bret Kavanaugh, and Thomas Griffith are three Bush nominees to the U.S. Court of Appeals for the District of Columbia on which the Senate never acted. Democrats successfully blocked a floor vote on Estrada's nomination, while the Judiciary Committee, as of the date of our Symposium, never acted on either Kavanaugh's or Griffith's nomination. I do not know Estrada personally, but I do know both Kavanaugh and Griffith, both of whom very kindly and generously have given their time to visit, more than once, my constitutional law classes.

33. See MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* 53-55 (rev. ed. 2003).

to have defined merit, at least in part, as including certain ideological commitments.<sup>34</sup> He insisted that his staff and Senators recommend candidates for judicial nominations that fit particular criteria, including a rigid commitment to original understanding in all cases. Thus there are administrations that define merit in terms of ideology.

The fact that administrations—and a number of commentators—define merit in terms of, or in part based on, ideology leads some empirical researchers to do the same. For instance, Segal and Spaeth measure the attitudes, or ideologies, of judges and Justices based on newspaper editorials at the time of their respective appointments,<sup>35</sup> while Lee Epstein and Gary King have suggested determining nominees' ideologies based on the Senators sponsoring them.<sup>36</sup> But Senators sponsor nominees for many different reasons, not the least of which is payback for political support or fealty. Some Senators also may not care about ideology or make assumptions about nominees' ideologies based on what others tell them. Moreover, of course, as others have suggested, one of the nation's most important appellate courts—the U.S. Court of Appeals for the District of Columbia—is not within a state. The District of Columbia has no Senators, and thus senatorial courtesy does not work in the same way for its judges as it does for those from the fifty states. An additional complication is that some states do not have any Senators from the President's party, in which case they have no input on nominations or the President pays more attention to what the highest elected official within the state from his party has to say about prospective nominations. In short, it is possible that sponsoring Senators signal nominees' possible commitments to particular ideologies, if and only if the Senators are well known (and can be shown) to prefer nominees with such commitments.

Empiricists should also consider three other possible measures of ideology. The first is simply to look at how different organizations characterize nominees' judicial attitudes. These definitions are unlikely to be neutral; they are as likely to be self-serving as the assessments of any other parties with vested interests in the fates of particular judicial nominations. A second measure might be reflected in the nominees' activities with organizations whose members are known to have or share particular attitudes about constitutional law. The problem with this standard is that it is unclear how many or even which activities demonstrate ideological commitments that will carry over into judging. Moreover, some nominees might not have

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34. See *supra* note 6 and accompanying text.

35. SEGAL & SPAETH, *supra* note 7, at 204.

36. See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002).

fixed attitudes about constitutional law generally or in particular fields. Third, researchers could identify which materials are pertinent for demonstrating nominees' judicial attitudes and assess nominees' attitudes on the basis of those materials. For instance, nominees' speeches or law review articles might reflect certain ideological commitments. This might be especially pertinent for nominees to appellate courts, particularly the Supreme Court. Whereas district court judges are presumably bound by the opinions of the federal court of appeals within their respective circuit, appellate judges are bound by Supreme Court opinions, but less so, and sometimes not at all, by the opinions of other panels within their respective circuits. The extent to which judges may not be strictly tethered by precedent requires examining the various other bases on which they might ground their opinions. The problems with this approach are, however, that some nominees might not have produced any extrajudicial writings, some writings or speeches might not reveal much about judicial nominees' attitudes, and the nominees can credibly argue that the speeches or articles are irrelevant because scholars and judges are not subject to the same constraints. Scholars are free to analyze legal questions on the basis of whatever sources they consider to be appropriate, while judges, even appellate ones, are not. The latter are duty-bound to assess legal questions on the basis of a relatively narrow range of materials, including precedent.

It is possible that measuring merit is complicated by yet one more factor: We have no consensus on whose opinion ought to matter in evaluating merit. Law professors, practitioners, and even other judges may have special insights into what jurists do, but there is good reason to think that none of these groups are perfectly neutral. Each group qualifies as an external source of authority on merit, but each group's members may only employ the conceptions of merit in which they have vested interests, with each gravitating toward the judges and Justices with whose opinions they tend to agree.

None of the deficiencies of particular definitions of merit, however, make empirical studies of judicial performance and selection impossible. We need not settle on a normative conception of merit on which everyone in the world can agree. What we need are normative criteria that are at least coherent, credible, and comprehensive. The next Part examines the missing element in most empirical research on judicial selection that precludes it from being as comprehensive and precise as it ought to be.

### III. THE BATTLE OVER THE MAINSTREAM IN CONSTITUTIONAL LAW

The reasons for the attraction, or dominance, of ideology in judicial selection are obvious. First, national political leaders care about

ideology because of the high stakes involved in judicial appointments. They understand that Article III judges enjoy life tenure and thus are immune from political retaliation against their decisions. Judicial opinions on constitutional law cannot be overturned through ordinary legislation but only through the extraordinary means of reversal by constitutional amendment or by a superior court (for federal district and appellate courts) or by the Supreme Court (for its own opinions). Consequently, national political leaders devote a good deal of time trying to ensure that the people appointed as judges and Justices will exercise power in ways that are satisfactory to them.

Second, national political leaders have almost no incentive to reach any consensus on merit. Most citizens pay little or no attention to lower court appointments, so leaders can expect little or no public backlash to their decisions on lower court appointments. Moreover, Presidents and Senators are reluctant to relinquish their institutional prerogatives in the selection process. If they ever do so, it is only in exchange for something else that they have decided is more important to them (at least for the moment). Presidents and Senators might sometimes have incentives to reach accommodations, but accommodations are much harder to come by for Presidents and Senators from the opposition party. Presidents from one party and Senators from the other often need conflict to sharpen the differences between them and to call attention to the stakes involved in the selection process. Bipartisan agreement on a general definition of merit would merely reduce, rather than preserve or expand, Senators' discretion in subsequent confirmation proceedings. It would tie Senators' hands in specific confirmation contests. Merit gets attention when there is a political advantage in addressing it.

The most intense confirmation contests between Republicans and Democrats focus not on merit but rather on the contours of the mainstream in constitutional law. Each side claims that its nominees are in the mainstream and that the other side's contested nominees are outside it. For instance, Senators opposed to the Bork nomination argued that he was outside the mainstream of constitutional law, while his defenders argued that his scholarship and thinking was well within it.<sup>37</sup> More recently, Democrats have supported six filibusters against judicial nominees whose views on constitutional issues are, in the Democrats' judgment, outside of the mainstream. The defenders have argued that just the opposite is true.<sup>38</sup>

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37. See generally ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* (1989).

38. See Neil A. Lewis, *G.O.P. Seeks to Ease Rules on Filibusters of Judgeships*, N.Y. TIMES, May 10, 2003, at A15.

The contest to define the mainstream has not just been rhetorical. A good deal is at stake. Each side desperately wants its nominees to be viewed as occupying the middle, rather than the extreme end or outside, of the spectrum in constitutional law. The middle is the safest, strongest ground. Moreover, opposing nominees, because they are outside the mainstream, puts the other side on the defensive. More important, each side appreciates the enormous stakes involved, for with each victory each side advances one step further in building a foundation for an enduring constitutional vision. The vision is important in guiding not just other judicial nominations but also the exercise of presidential and legislative authority. The prize is shaping constitutional law for as far into the future as possible.

While it is not hard to understand why political leaders care intensely about securing the mainstream—or the middle—in constitutional law, it is harder for someone outside of (or not invested in) the process to determine what counts as the middle. While this determination would be useful for analyzing the claims of the opposing sides in defining the mainstream, I consider in Part III.A some of the difficulties with determining the mainstream in constitutional law. With these difficulties in mind, I then propose ways in which we might figure out the mainstream, or the middle, in constitutional law.

#### A. *Problems with Defining the Middle in Constitutional Law*

There are several major problems with identifying the middle ground in contemporary constitutional law. First, empirical analysis cannot easily capture what counts as the middle because the choices of what to emphasize or count are value-laden. Anyone looking to define the middle, or the mainstream (and the two are not necessarily the same), in constitutional law must make judgments about relevance: Are all cases relevant? Should we only look at the judgments or outcomes in particular cases, or should we also look at the reasoning (including its quality and extent)? Where, for instance, do seemingly obvious cases like *Roe v. Wade*,<sup>39</sup> *Lawrence v. Texas*,<sup>40</sup> and *Lee v. Weisman*<sup>41</sup> fit? Some might argue that they are clearly on the “left” in constitutional law, but others might argue that they are consistent with a libertarian perspective on the “right.” Arguing that one or the other of these positions is correct is just another value judgment.

Second, an even more serious problem with defining the middle or the mainstream in constitutional law is that neither the categories we employ in assessing judicial performance nor many nominees’ constitutional views are fixed. Because of the phenomenon of ideo-

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39. 410 U.S. 113 (1973).

40. 539 U.S. 558 (2003).

41. 505 U.S. 577 (1992).

logical drift, categories are not static; particular perspectives on constitutional law associated with particular political factions may over time be appropriated by or become associated with different political factions.<sup>42</sup> For instance, Chief Justice John Marshall reflected a “conservative” rather than a “liberal” perspective on constitutional law, because he usually favored the status quo. His successor as Chief Justice of the United States, Roger Taney, was understood, at the time of his appointment, as representing a “liberal” perspective on constitutional law because he was thought to favor progressive legislation and reform of the status quo.<sup>43</sup> It is only because of ideological drift that each is now viewed differently.<sup>44</sup> New Deal liberals found they had a lot in common with the opinions of Chief Justice Marshall, because of their consistent support for a strong national government; and conservatives admired Taney’s ardent efforts to resist the expansion of the national government at the expense of state sovereignty.

The labels “liberal” and “conservative” do not fit contemporary Justices much better. For instance, Justice John Paul Stevens, appointed to the Court in 1976 by President Ford, is frequently described as a “liberal” by commentators and critics.<sup>45</sup> Yet he hardly seems to have much in common with other “liberals” such as Associate Justices William Brennan and Thurgood Marshall, with whom he sat for many years. Nor does it seem appropriate to describe Justices Kennedy and O’Connor as strictly “conservative” simply because they have often favored protecting state sovereignty in Commerce Clause<sup>46</sup> and Eleventh Amendment cases.<sup>47</sup> They also have voted to reaffirm the embattled decision of *Roe v. Wade*,<sup>48</sup> to strike down antisodomy laws in *Lawrence v. Texas*,<sup>49</sup> and to strike down the Virginia Military

42. See Michael J. Gerhardt, *The Rhetoric of Judicial Critique: From Judicial Restraint to the Virtual Bill of Rights*, 10 WM. & MARY BILL RTS. J. 585, 637-38 (2002).

43. See Michael J. Gerhardt, *The Lives of John Marshall*, 43 WM. & MARY L. REV. 1399 (2002).

44. See *id.*

45. See, e.g., Richard G. Wilkins et al., *Supreme Court Voting Behavior: 2001 Term*, 30 HASTINGS CONST. L.Q. 307, 311, *passim* (2003); Youngsik Lim, *An Empirical Analysis of Supreme Court Justices’ Decision Making*, 29 J. LEGAL STUD. 721, 737 (2000).

46. See *United States v. Morrison*, 529 U.S. 598 (2000) (majority opinion of Rehnquist, C.J., joined by O’Connor, Scalia, Kennedy, and Thomas, JJ.); *United States v. Lopez*, 514 U.S. 549, 568-83 (1995).

47. *Alden v. Maine*, 527 U.S. 706 (1999) (majority opinion of Kennedy, J., joined by Rehnquist, C.J., and O’Connor, Scalia, and Thomas, JJ.); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (majority opinion of Rehnquist, C.J., joined by O’Connor, Scalia, Kennedy, and Thomas, JJ.).

48. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (opinion of O’Connor, Kennedy, and Souter, JJ.).

49. 539 U.S. 558 (2003) (majority opinion of Kennedy, J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.); *id.* at 579-85 (O’Connor, J., concurring in the judgment).

Institute's policy to exclude women.<sup>50</sup> It is conceivably more accurate to describe Justices Kennedy and O'Connor as moderates, though many Senators would resist doing so because it would cede the middle ground to these Justices rather than to others they might prefer to place there.

A third problem with fixing the middle ground in constitutional law is that Justices and judges sometimes shift their attitudes about constitutional law either generally or in particular cases. Justice Harry Blackmun is often described as evolving, or growing, over time into a more "liberal" justice.<sup>51</sup> Others might move in the other direction. Segal and Spaeth claim, *inter alia*, that Justices Stevens and Souter each became more "liberal" over time, while Justice White became more "conservative" over time.<sup>52</sup> As Chief Justice, William Rehnquist has sometimes been said to have moderated some views,<sup>53</sup> as he arguably did in writing the Court's opinions reaffirming *Miranda v. Arizona*,<sup>54</sup> concurring in *United States v. Virginia*,<sup>55</sup> and upholding the Family Leave Act as an exercise of Congress's authority pursuant to Section Five of the Fourteenth Amendment in *Nevada Department of Human Resources v. Hibbs*.<sup>56</sup>

Some people seem to assume that most nominees have ideological precommitments at the times of their nominations that are impervious to change, but it is impossible to prove that this is true, especially when the nominees themselves disclaim holding any such commitments.

Fourth, legal academics have done little to illuminate what may fall inside or outside the mainstream of constitutional law. Most legal scholars appear interested less in finding common ground than in delivering the knock-out punch against opposing points of view.<sup>57</sup> A common goal of legal scholarship is paradigm-shifting, but in pursuing this goal, legal scholars will dismiss as wrong or dangerous points of view affiliated with the paradigm they are trying to undo. The pursuit of this goal is not likely to enrich our understanding of

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50. *United States v. Virginia*, 518 U.S. 515 (1996) (majority opinion of Ginsburg, J., joined by Stevens, O'Connor, Kennedy, Souter, and Breyer, JJ.).

51. See, e.g., BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 316 (1993).

52. SEGAL & SPAETH, *supra* note 7, at 218.

53. A number of suggestions have been made as to why Chief Justice Rehnquist seems to have moderated some views. See, e.g., Yale Kamisar, *Foreword: From Miranda to § 3501 to Dickerson to . . .*, 99 MICH. L. REV. 879, 889-92 (2001).

54. See *Dickerson v. United States*, 530 U.S. 428 (2000) (upholding *Miranda v. Arizona*, 384 U.S. 436 (1966)).

55. 518 U.S. at 558-66 (Rehnquist, C.J., concurring in the judgment).

56. 538 U.S. 721 (2003).

57. Cf. Suzanna Sherry, *Too Clever by Half: The Problem with Novelty in Constitutional Law*, 95 NW. U. L. REV. 921 (2001) (noting that in many scholarly discussions of the counter-majoritarian difficulty, "grandtheory" tends to dominate over simpler and more coherent arguments).



which views actually do, rather than ought to, fall within the mainstream of American constitutional law.

Fifth, the media hinders sophisticated discussions of judicial performance. The media has begun to shirk its traditional role in educating the public. It has moved from reporting “hard” news, or facts and figures, to reporting “soft” news, or speculation and commentary.<sup>58</sup> The proliferation of media outlets and twenty-four-hour news has put enormous pressure on newspapers and television reporters to emphasize scandal. The media prefers drama and conflict, because it gets people’s attention. As candidates and commentators increasingly feel the need to characterize opponents in extreme terms, the media follows suit. Candidates are thus “liberal” or “conservative,” and Justices are also one or the other. No one, apparently, begins as a moderate or ends up as one. From the perspective of the media, the middle in politics is nothing more than the otherwise unoccupied ground that the candidates fight to control, while the media simply covers the flashier portions of the fight.

### *B. Sketching the Middle*

Assessing judicial ideologies is difficult without having some yardstick with which to measure them. One cannot talk about extreme views, or views falling outside of the mainstream, without clarifying which views are not extreme, or do not fall outside the mainstream. It is possible that the measurement of an ideology is a purely normative matter, depending on its appeal to lawmakers and its consistency with constitutional law as they understand it. Even then we need to define the middle, or moderation, as a means of curbing reckless or misleading rhetoric. We need our rhetoric to fit the complicated business of judging. So the question is how accurately can we describe a middle course or the contours of the mainstream in constitutional law.

I offer a few possible answers, with each of the difficulties described above in mind. First, we can identify the middle ground as that which each of the contending sides in confirmation contests is trying desperately to occupy. We can define it, in other words, as an aspiration. We can assess nominees based on how well they fit the description of the middle ground, or mainstream, of their supporters. One problem with this definition is that it might allow one side to define the terms on which it prefers for its nominees to be assessed, without any second-guessing; however, this understanding of the mainstream puts pressure on supporters of particular nominations to

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58. See Hess, *supra* note 9.

be careful about how they characterize nominees or risk having the latter fail to meet expectations.

Second, we could define the mainstream as comprised of the pool of people who successfully made it through the judicial nomination process. They constitute a large and diverse pool, which reflects the approval of the governing elite. The problem with this understanding of the mainstream is that it fails to take into account the fact that many people make it through the process without close scrutiny. Many of the people confirmed also might not have had fixed views at the time of their appointments or might change their views over time. In addition, it is not clear why we should ever define the mainstream based on what judges and Justices actually do, because they act independent from the governing elite once they are confirmed. Indeed, most judges and Justices serve long after the political coalition or majorities who chose the people responsible for their appointments have ceased to exist. For instance, John Marshall served most of his long tenure as Chief Justice long after the demise of the Federalist party with which he had been associated.

Moreover, defining the mainstream as those whom the Senate has confirmed merely gives each side an incentive to push the envelope. With each victory in the confirmation process, each party has expanded the possibilities for its nominees. Once people are confirmed, their parties can point to them as examples, or precedents, to guide future confirmation proceedings.

A more interesting but speculative test might be to ask whether the President would still nominate or the Senate still approve the same judge if they knew what kinds of decisions the judges would make. In many cases, nominees are relatively blank slates, and, in any event, judges and Justices presumably fulfill special obligations independent from presidential and senatorial influence. So it might not be fair to attribute to Presidents and Senators all the decisions made by the judges and Justices they have approved.

Third, the mainstream could be understood as simply consisting of the views of those at the center of the Court. These days that would presumably be Justice O'Connor, because she rarely dissented in the 2003 Term.<sup>59</sup> The problem is that she did not decide these cases alone, and it is unclear why those with whom she joined in majority opinions ought to be excluded from the mainstream. Moreover, the center can shift, and there is no guarantee that Justice O'Connor will be there as often next year. Nor is it clear why dissenters ought to be excluded entirely, because dissents sometimes later become the law.

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59. See Linda Greenhouse, *In a Momentous Term, Justices Remake the Law, and the Court*, N.Y. TIMES, July 1, 2003, at A1.

The fourth and final possibility is to define the mainstream as something more dynamic and broader than a specific Court or specific Justice at a particular moment in time. The Court is not alone in making constitutional law. Our political leaders make a great deal of constitutional law, much of which eludes judicial review.<sup>60</sup> Moreover, the Court approves the vast majority of the constitutional decisions that it does review. It would also be wrong to assume that every Supreme Court decision reflects mainstream constitutional values. Sometimes the Court gets it wrong, as it did in *Chisholm v. Georgia*,<sup>61</sup> *Dred Scott v. Sandford*,<sup>62</sup> and *Korematsu v. United States*.<sup>63</sup> The constitutional views of Presidents and Senators are relevant to the makeup of the mainstream, because they have the power to try to move the Court in different directions (or perhaps keep it on course) by virtue of their respective authorities in the appointments process. They also have the power to shape the size, direction, and priorities of the federal government. Moreover, Presidents and members of Congress perform critical roles in approving enduring constitutional changes and in settling constitutional crises—failures within the Constitution to provide solutions to certain kinds of disputes.<sup>64</sup> Consequently, it is possible to define the mainstream as the dominant doctrine, outlook, and thinking on constitutional law in a given period. The Court provides formal doctrine, the courts and national and state political leaders shape the constitutional outlook of a particular era, and all of these along with constitutional commentators and historians (in a wide variety of fora) provide critical thinking on constitutional law. This perspective on the mainstream has the virtue of encapsulating the constitutional activities of a given era. Its problem is that there is no method on which all people could agree for determining the relevant doctrine, outlook, and thinking of a particular era. Historians might be in the best position to pull this information together, but only in retrospective. It is a challenge, to say the least, for someone to step outside of his or her own time to develop a credible perspective on it. Time does not stand still for any person or any thing, and none of the things that we might think are essential for shaping the mainstream—doctrine, outlook, and critical thought—are purely static.

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60. See Michael J. Gerhardt, *The Constitution Outside the Courts*, 51 DRAKE L. REV. 775 (2003).

61. 2 U.S. (2 Dall.) 419 (1793).

62. 60 U.S. (19 How.) 393 (1856).

63. 323 U.S. 214 (1944).

64. See Michael J. Gerhardt, *Crisis and Constitutionalism*, 63 MONT. L. REV. 277 (2002).

## IV. PROVING (HOW MUCH) IDEOLOGY MATTERS

Proving that ideology is a dominant factor in the judicial selection process—as many people suppose—is no small feat. There are a number of complications with determining the extent to which ideology was a major factor or the primary basis for the President's nomination and the Senate's confirmation of various judicial nominees. Below, I first review these problems and then offer some modest suggestions for future empirical analysis on the significance of ideology in the judicial selection process.

A. *Fixing Ideology*

There are a number of problems with proving empirically whether and, if so, how much ideology was a factor in the nominating or confirmation phase. To be sure, this is a question that social scientists have spent considerable time and effort trying to answer.<sup>65</sup> Nevertheless, several problems persist. First, reaching consensus on what qualifies as ideology is difficult. While I personally understand ideology as a precommitment to certain constitutional values or to resolving particular questions of constitutional law, regardless of the facts of particular cases, this is but one understanding.<sup>66</sup> Indeed, people widely disagree over how to define ideology and even whether Presidents and Senators have taken ideology into account in the appointments process. Consequently, one difficulty with proving that ideology matters in the selection process is adopting a credible definition of ideology.

The second problem is that it is a mistake to assume that every judicial nominee has a well-conceived or thoroughly worked-out constitutional ideology. It is possible that many, even most, do, but judicial nominees often publicly disavow commitment to a particular constitutional ideology. Moreover, ideology presumably functions as a blinding mechanism, so that it is conceivable that some nominees may not be aware that they have certain ideological commitments.

Third, and perhaps most important, the relevance of ideology to particular judges' decisions or to particular confirmation decisions may not be evident in the public record. If the President and his nominees deny that the latter have particular ideological commitments, then the burden shifts to the other side to prove them wrong.

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65. See, e.g., Charles M. Cameron et al., *Senate Voting on Supreme Court Nominees: A Neoinstitutional Model*, 84 AM. POL. SCI. REV. 525 (1990); Jeffrey Segal, *Senate Confirmation of Supreme Court Justices: Partisan and Institutional Politics*, 49 J. POL. 998 (1987); Jeffrey A. Segal et al., *The Role of Ideology in Senate Confirmation of Supreme Court Justices*, 77 KY. L.J. 485 (1988-89); Donald R. Songer, *The Relevance of Policy Values for the Confirmation of Supreme Court Nominees*, 13 LAW & SOC'Y REV. 927 (1979).

66. See, e.g., David W. Minar, *Ideology and Political Behavior*, 5 MIDWEST J. POL. SCI. 317 (1961) (noting different conceptions and definitions of ideology).

This is precisely the dynamic with President Bush's judicial nominations. He has publicly defended his nominations on the ground of merit, and he has disavowed that he has employed a litmus test or chosen nominees based on particular ideological commitments.<sup>67</sup> His nominees also publicly disavow such commitments.<sup>68</sup> Consequently, skeptical Democrats must infer his selection criteria—including any preference for ideological precommitments—from the kinds of nominees that he has chosen.

Moreover, most judicial nominations do not fail because the Senate formally rejects them. They fail because of inaction. Senate rules provide that a nomination lapses unless the Senate has acted on it before the end of the current legislative session, and if they do not, the nominations fail. For instance, in President Clinton's final year in office the Senate failed to act on more than sixty of his judicial nominations.<sup>69</sup> There is little or no record on these nominees, so it is not possible to prove precisely why the Judiciary Committee did not hold hearings or votes on these nominees. The official record is silent on why these nominations failed.

To complicate matters further, the Senate debates that do occur over nominees rarely employ the term "ideology." More often than not, the focus in confirmation contests has been on such matters as the nominee's integrity, experience, competence, and temperament.<sup>70</sup> When the debates do shift focus to nominees' commitments to (or expression of) particular constitutional views, they feature discussions about whether the nominee comes from the "mainstream" of constitutional law.

Fourth, proving that ideology significantly matters to the fates of judicial nominations is complicated by the fact that Presidents and Senators rarely base their decisions in the appointments process on a single factor. Presidents, or their counselors, usually employ a range of criteria for making decisions on whom to nominate.<sup>71</sup> In the Senate, a single factor is not necessarily determinative. It is possible that Senators might initially be disposed against particular nominations for one or two basic reasons, but their public opposition may not necessarily be predicated on these. Nor is it unusual for Presidents and Senators to base public decisions on factors they do not disclose.

67. Adam Nagourney & Robin Toner, *In Final Debate, Clashes on Taxes and Health Care*, N.Y. TIMES, Oct. 14, 2004, at A1.

68. See, e.g., Charles Lane, *Lawmakers Press Nominee*, WASH. POST, Sept. 27, 2002, at A5.

69. See Peter Hardin, *Bush Rescinds Offer to Gregory; Remains Eligible for Federal Bench*, RICH. TIMES-DISPATCH, Mar. 20, 2001, at A1.

70. See Michael J. Gerhardt, *Divided Justice: A Commentary on the Nomination and Confirmation of Justice Thomas*, 60 GEO. WASH. L. REV. 969 (1992).

71. See generally ABRAHAM, *supra* note 4.

It is not incumbent upon our national leaders to disclose all the grounds for their constitutional decisions.

Moreover, Presidents and Senators must make different kinds of decisions in the selection process. Because Presidents are responsible for choosing nominees, they can make decisions about which persons they think are best qualified or best fit their selection criteria. Senators use a different calculus. While they are often able to provide input (and even make specific recommendations) on nominations, their primary responsibility is to determine, not necessarily whether the nominee is ideal or the best qualified, but rather whether the nominee is acceptable according to whatever criteria each Senator decides is relevant. It is thus not unthinkable that 100 different Senators may use 100 different sets of criteria for evaluating judicial nominees.

### *B. How to Show Ideology Matters*

The aforementioned problems are not necessarily fatal to the enterprise of proving that ideology makes a difference to outcomes in the confirmation process. Patterns invariably emerge within the process. For instance, the Senate usually (but not always) approves the vast majority of a President's judicial nominations. One could thus try to identify what successful nominees have in common or what traits or characteristics are shared by unsuccessful nominees. These are not necessarily easy ventures, but they are not impossible. For instance, social scientists, including David Yalof, have shown what they regard as the characteristics that the people nominated to the Supreme Court over the past few decades have had in common.<sup>72</sup>

Once one sets out to demonstrate the particular significance of a single factor, such as ideology, the task becomes somewhat more complicated. To make this showing, one needs to first determine the relevant independent and dependent variables.<sup>73</sup> The variable that is to be explained—in the case of the confirmation process, the vote share (or how Senators voted on particular nominations) or the absence of a vote on a particular nomination—is the dependent variable; it “depends,” or turns, on other variables. The latter are what social scientists call independent or “explanatory” variables, because they help to explain the dependent variable. The independent or explanatory variables are not themselves explained by the theory one is trying to prove; they simply do the explaining. The effects of these variables are called coefficients. Mapping the coefficients on graphs

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72. DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES* (1999); *see also* Epstein et al., *supra* note 1.

73. For an excellent primer on statistical analysis, *see* RAY C. FAIR, *PREDICTING PRESIDENTIAL ELECTIONS AND OTHER THINGS* (2002).

(to determine the points at which the variables intercept) and testing the coefficients are relatively sophisticated steps, which must be done in statistical analysis. But my point here is to clarify that, as an empirical matter, ideology is not the outcome that needs to be proved; instead, it is one of numerous variables that determine outcomes in the confirmation process. Thus, we need to determine the relative impacts of ideology and other independent variables in the confirmation process.

### *1. Proving Judicial Ideology*

One cannot prove that ideology matters without initially determining how ideology manifests itself. Presumably, it must reflect some commitment to a particular approach to constitutional interpretation, regardless of the facts of particular cases. So the challenge for an empiricist is to track down and assess the intensity of a nominee's expressions of any such ideological commitments. As I have suggested, a common approach among social scientists is to find these expressions by means of external indicators such as newspaper editorials and sponsoring Senators, even though these indicators may not all be reliable or credible. These indicators are by no means the only ones. Indeed, I suggest almost a dozen possible indicators of nominees' ideological commitments, each of which can be empirically measured.

First, if the nominees are judges, one can inspect their opinions. Opinions merit special attention because judges speak through them. They have enormous potential to reveal what, if any, ideological commitments are at work. If opinions contain judges' explicit acknowledgments of ideological commitments, they ought to be given special weight, particularly because judges are not obliged to make such acknowledgments in constitutional adjudication. If opinions instead reflect patterns of decisionmaking, then these too merit special consideration. This is especially true if the patterns relate to methodology or prioritization of sources of decision.

Second, nominees' writings and speeches might illuminate their ideological commitments. These materials are important, to some degree, because some people are nominated in part because of the views expressed within them. Their writings and speeches are important, in other words, because they attracted attention from the right people. If nominees' writings and speeches contain the nominees' admissions of certain ideological commitments, they merit special weight. If they do not, then patterns in methodology or prioritization of sources could become relevant, especially if they are nearly or absolutely uniform.

Alternatively, one could merely award a number to a nominee, which would be based on the number of his or her extrajudicial writings on controversial subjects. The actual content of these writings may be less important than the number, because it is possible (and thus one would need to show) that the larger the number of writings on controversial subjects, the more a nominee has opened himself or herself to attack for his or her views on those subjects. (It is, of course, also possible that nominees can make controversial statements about relatively mundane topics.) Thus, especially prolific constitutional scholars would likely receive very high numbers, which could be negatively weighted because of the likelihood that some Senators will try to use their writings against them.

Fourth, other possible indicators of ideological commitments may be nominees' professional activities. Some activities are more revealing than others. For example, someone who has dedicated a great deal of time to opposing the death penalty as unconstitutional is likely to have a settled view on the matter. It is, however, possible for some nominees to argue that their professional activities were merely undertaken at the bidding of their superiors or clients. Thus an empiricist needs to carefully screen nominees' professional activities. The more they fall into controversial areas, the more negative weight they can be given in the confirmation process.

Fifth, one might ask which groups support particular nominees and on what bases. Groups no doubt might have different reasons to support different nominees, but some groups may be well known for preferring nominees with certain kinds of ideological commitments. The preferences of the latter group might be particularly relevant, especially if the group has identified the grounds for its approval of the nomination.

Sixth, one could measure which groups are opposing which nominees and the grounds for their opposition. Of particular interest will be the ones charging unacceptable ideological commitments. The more groups that do this, the more likely Senators will know about their opinion.

Alternatively, one could simply measure the numbers of witnesses testifying for and against particular nominations. While this data is obviously not available for nominees who never receive hearings, it could be very useful for illuminating the dynamic within particular confirmation contests. The larger the number of witnesses testifying, the more likely it is to be significant. There must be a reason why one nomination draws more witnesses than another. That reason may or may not have anything to do with ideological commitments, but it does bear on the nominee's likely fate. So an empiricist needs to determine the grounds on which witnesses testify for and against



particular nominations, which can then be factored into his or her analysis.

Seventh, one could consult an administration's selection criteria. Through their nominating authority, Presidents are able to set the terms of debate in the confirmation process. If nominees are not presented based on their ideologies, the burden shifts to the other side, and in practice it is hard for Senators on the defensive in the confirmation process to direct its results.

Eighth, empiricists ought to consider measuring the amount of time devoted in hearings to discussing nominees' ideologies. This requires counting not only the number of Senators' statements and questions pertaining to ideology but also how much time nominees spend defending their judicial philosophies or explaining their supposed ideologies. It is hard to dismiss a large amount of attention as nothing more than pretext. Even if it were, it shows the particular role played by ideology in particular hearings.

A related empirical inquiry could be undertaken to simply measure how much time nominees spend defending themselves against charges in their confirmation hearings. A rule of thumb in confirmation hearings is that the more time nominees spend testifying before the Judiciary Committee (the "Committee") the worse their chances of confirmation become. This is not because they are bad witnesses, though they may be. The concern, however, is that the longer the nominee is required to testify, the more likely there is something problematic about the nominee. Once these figures are determined, they could be grouped according to the reasons for extended testimony.

Ninth, people who are not judges, even if they are academics, can credibly claim that their public musings do not reflect what they would do as judges because their duties as judges would require them to abide by certain norms, such as following precedent, that they are not bound to as scholars or commentators. These disclaimers are made under oath and thus need to be factored into empirical analysis as well, for they shift the burden to the opposition not just to disprove them but also to suggest the nominees lied under oath.

Tenth, a final measure of ideological commitments may come from the testimony of those who claim to know the nominees best. What, in other words, do the people who claim to have read the nominees' writings or opinions claim about the nominees' ideological commitments? This may not be entirely reliable, because many of the people contacting or testifying before the Committee may have vested interests in the outcomes of the hearings. To avoid the latter problem, it might be useful to examine whether these people are testifying against their nominal parties' interests. For instance, Michael

McConnell benefited from having a number of prominent Democrats urge the Committee to approve his nomination, even though some Democratic Senators were disposed to be against it.<sup>74</sup> While McConnell had produced a relatively high number of extrajudicial writings on quite controversial subjects, that number could be reduced, or counterbalanced, by a different number based on the size of the group urging his confirmation against their own party's supposed interest.

Last but not least, empiricists ought to consider examining all failed nominations in order to determine what traits, if any, they had in common. It is possible that they all, or most of them, attracted opposition based explicitly on ideological concerns. But they also might have attracted opposition because of a confluence of several of the other factors that are discussed *infra* in Parts IV.B.2 through IV.B.10.

## 2. Senate Composition

Confirmation proceedings do not occur in a vacuum. Among the other factors likely to have an impact on their outcomes is the Senate's composition. Presidents often take the composition of the Senate into account in deciding whom to nominate and when. The representative strength of a President's political party in the Senate is obviously important, because it determines which parties control the Judiciary Committee, the agenda on the floor of the Senate, and the length of debate. If the minority party controls at least forty seats in the Senate, it can then block some judicial nominations by filibustering them.<sup>75</sup> Threatening filibusters or temporary holds (which are, in effect, mini-filibusters) can sometimes influence whether and when Presidents make certain nominations.

The Senate composition can thus influence how quickly and even how many nominations get through to the Senate floor for final votes. If the opposing party controls the Senate, it raises the likelihood of obstruction of at least some judicial nominations. Hence if the President's party does not control the Senate, this number is likely to be a negative coefficient. If, however, the President's party does control the Senate, it is likely to be a positive one, and quite large if the President's party controls more than sixty seats. If the President's party controls a majority but less than sixty seats, it still merits a positive coefficient, though the possibility of filibuster merits making it not a very high one.

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74. See Jan Crawford Greenburg, *Critic of Roe vs. Wade in Judiciary Hot Seat*, CHI. TRIB., Sept. 19, 2002, at 15.

75. See Standing Rules of the Senate, S. DOC. NO. 106-15, R. XXII (2000), available at <http://www.rules.senate.gov/senaterules/rule22.htm>.

### 3. *Timing*

Another factor that can potentially influence confirmation outcomes is timing. Election years tend not to be good times for Presidents to make judicial nominations, particularly to the Supreme Court. In the nineteenth century, the Senate did not act on at least nine Supreme Court nominations, supposedly because the majority party was trying to keep the vacancies open until after the next presidential election.<sup>76</sup> In President Clinton's final year in office, the Senate did not act on more than sixty of his judicial nominations.<sup>77</sup> Similarly, the Democratic-led Senate did not act on dozens of the first President Bush's judicial nominations in his final year in office, presumably because of a desire to reserve as many judicial vacancies as possible for the next President.<sup>78</sup>

Timing might matter in a different way. Most failed nominations do not get so far as receiving Committee votes; they fail, as I have suggested, because of inaction. Moreover, not all nominations that get hearings are scheduled for Committee votes. Consequently, one needs to figure out how long a nomination has gone without a hearing or whether it has gotten a Committee vote within a certain period of time (presumably the average length of a time between a nomination and a Committee vote). Those nominations exceeding the average length of time without yet getting a hearing or Committee vote will likely not be approved. Moreover, the closer a nomination comes to being made near the end of a legislative session, the less delay is needed to nullify it.

Consequently, timing can be quantified in at least three ways, each negatively. The first is the extent to which it exceeds the average length of time for confirmation; the second is whether the nominations have been made in an election year; and the third is the extent to which a nomination was made with less time left in a session than the average amount of time needed for confirmation.

### 4. *Sponsoring Senators*

Sponsoring Senators may make a difference to the fates of at least some judicial nominees. The more powerful the Senator, the more likely one might expect nominees he has supported to be confirmed. For instance, the Senate has confirmed almost a half-dozen nominees who at one time or another worked for Senator Orrin Hatch, the former Chair of the Judiciary Committee.<sup>79</sup> Indeed, Senator Hatch convinced President Clinton to nominate a former aide to a district court

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76. See ABRAHAM, *supra* note 4.

77. See Hardin, *supra* note 69.

78. See GOLDMAN, *supra* note 1.

79. Jonathan Groner, *The Judge Maker*, LEGAL TIMES, Aug. 19, 2002, at 1.

in Utah, after he had held up every other judicial nomination pending President Clinton's compliance.<sup>80</sup>

### 5. *Presidential Popularity*

It is possible that a President's popularity might have an effect on a nomination's fate. By popularity, I mean the President's political strength as reflected in, *inter alia*, his approval ratings with the public. These might show the risks involved in a fight with the President. The more closely a nomination is identified with the President (or the more it means to him) or his policies, the more likely that the popularity of the President or his policies will be an important factor. The more popular the President or the policies with which the nominee is associated, the greater likelihood this popularity will benefit his nomination. The more political coinage that a President has on which to draw from in confirmation contests, the more likely Senators will suffer some political damage or loss from such confrontations. Some Senators might choose contests over some judicial nominations because they believe the conflicts can improve their standing with important constituencies or can underscore their own political commitments. But contests are not likely to be completely cost-free, particularly insofar as Presidents remember them and have the means and opportunity to seek retaliation.

A related factor may be party cohesion or fidelity. The extent to which Senators from the same party are willing to stand together on judicial nominations makes a big difference as to whether they can successfully filibuster or defeat nominations in Committee or on the Senate floor. The degree of cohesion or unity within a caucus is pertinent to how much power it can wield under the Senate rules and its influence in striking deals with the President. Sometimes Senators do not do what their party leaders or Presidents from their parties tell them. Sometimes divisions in the ranks of the Senators from the President's party are a problem for many nominees, with some joining members of the opposition party to defeat them.

### 6. *The Blue-Slip Process*

Another factor with potential influence on the confirmation process is whether the (and which) blue-slip process is in place at the time of a nomination.<sup>81</sup> The blue-slip process allows a Senator to block a nomination made to an office in that Senator's home state. This process is usually available to Senators from both parties, but sometimes Presidents or Senate leaders have restricted it to Sena-

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80. See GERHARDT, *supra* note 33, at 307.

81. On the blue-slip process, see Brannon P. Denning, *The "Blue Slip": Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75 (2001).

tors only from the President's party. If this process is in place in either form, it expands Senators' opportunities to block nominations. It particularly reinforces the strength of the majority party in the Senate. If that party is targeting the expression of support for particular policies or ideologies, then nominees who can be shown to have made such expressions face potentially serious obstacles to their confirmation from the outset.

The blue-slip process for particular nominations can thus be shown in at least two ways. First, it can simply be shown as the number of times it has been invoked to block nominations. This number reflects its vitality at a given moment in the confirmation process. Alternatively, and perhaps more meaningfully, an empiricist can measure what, if any, characteristics nominations blocked through the blue-slip process had in common. The number of nominations with supposed ideological commitments that triggered senatorial concern can then be calculated. It will be a fraction of the total number blocked through the blue-slip process.

#### *7. Numbers of Witnesses*

The numbers of witnesses called for and against nominees are likely to be pertinent to their chances of success in the confirmation process. The number of people testifying, particularly against a nominee, is likely to signal some problem with the nomination. If more people are testifying against a nominee than for him or her, the nomination is almost certainly in trouble. Of course, these numbers alone do not indicate the reasons for support or opposition. Some people may be opposed because of the nominee's supposed ideological commitments, but one must go behind these numbers in order to determine this information.

#### *8. The American Bar Association*

The American Bar Association's ratings on nominees may affect the fates of nominations. Positive ratings do not guarantee confirmation, but negative or largely unfavorable ratings are bound to considerably lower a nominee's chances for confirmation. Even split ratings can be a problem (though not always fatal). The American Bar Association comes as close as any group to providing a "neutral" assessment of a nominee's qualifications, and its ratings may be used by either side in a confirmation contest depending on the extent to which they are favorable or unfavorable. Thus, its assessment needs to be factored into any analysis of the process.

### 9. *Integrity*

Nominees ought to get an integrity rating. We expect judicial nominees to be honest people, whose integrity is beyond reproach. More than a few judicial nominations have failed because of nominees' ethical lapses. One problem (of many) torpedoing Clement Haynsworth's nomination to the Supreme Court was his participation in some cases involving companies in which his wife had owned stock.<sup>82</sup> Less than two decades later, Douglas Ginsburg asked President Reagan to withdraw his nomination as an Associate Justice because he had failed to inform the FBI during background checks that he had smoked marijuana while he was a tenured Harvard Law School professor.<sup>83</sup>

### 10. *Merit*

Of course, merit is a factor that cannot be ignored in evaluating the judicial selection process. The absence of merit, or questions about nominees' qualifications, can be fatal to judicial (and of course many other) nominations. Even though we lack consensus on merit, it would be silly to dismiss it as irrelevant to the outcome of confirmation proceedings. In an empirical analysis of the selection process, we must, at the very least, measure the extent to which witnesses before the Judiciary Committee and members of the Committee focus on merit in their statements or questions. Presumably, the more it expressly comes up in hearings, the more potential impact it may have on a nomination's fate. Of course, merit might be a red herring or a pretext. It is thus very important to give special attention to what those who come closest to being neutral observers or less-self-interested parties have said about the merits of particular nominations. So we might give special weight to evaluations by the American Bar Association, or perhaps to leading scholars, on the merits of particular nominations.

Because so many people (particularly Republicans) have questioned the neutrality of the American Bar Association and of law professors generally, one might have to look elsewhere for neutral or less-self-interested evaluators of merit. These are just nine factors, besides ideology, that are likely to affect the fates of judicial nominations. The odds are that judicial nominations will not founder simply because of one of these factors. Moreover, it is possible, if not likely, that the stated grounds of opposition to judicial nominations might not be entirely credible; they might reflect, at least to some extent, a pretext to oppose a nomination. For instance, the Judiciary Commit-

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82. YALOF, *supra* note 72, at 104-08.

83. BRONNER, *supra* note 37, at 332-35.

tee never acted on President Clinton's nomination of Elena Kagan to the U.S. Court of Appeals for the District of Columbia in 2000. She never got a hearing, much less a vote, on her nomination, in spite of her strong credentials. No one expressed opposition to her because of her ideology. Instead, opposition, to the extent it was ever manifest in public, focused more on whether the appellate court to which she had been nominated had a caseload to justify filling all of the seats to which the President had nominated people.<sup>84</sup> Some people might view this opposition as merely a pretext to preclude the confirmation of someone whom the opposition party feared might be a liberal activist or who would then occupy a seat that it would have preferred for one of its own to occupy. After President Bush took office, Republican leaders acknowledged the court's caseload justified filling all of its seats after all.<sup>85</sup> And President Bush then nominated Miguel Estrada to one of them. It is possible that at least some opposition to the Estrada nomination derived in part from a desire for payback, though the grounds cited related to Estrada's temperament and possible judicial ideology. While payback is another possible factor that needs to be monitored in the confirmation process, it is hard to verify, because Senators rarely (but sometimes do) acknowledge that it is the basis for their opposition.

In the final analysis, proving that ideology significantly affects the fates of nominations is not easy. Proving it may be so difficult that many people simply opt for anecdotal evidence or opt for merely analyzing the appeal of a particular nominee's ideology. After all, it is not necessary to prove that all nominees shared commitments to problematic ideologies, but rather only the ones that Senators end up choosing to oppose for stated or unstated reasons. The higher, or more powerful, the court to which someone has been nominated, the more likely Senators will be concerned about the person's likely judicial ideology. It is thus likely that Senators will be more concerned with the likely ideologies of circuit court or Supreme Court nominees than district court nominees. In any event, as long as Senators do not fear the President, Senators remain relatively free to pick and choose which nominees to oppose and on what bases.

## V. CONCLUSION

I close with a challenge. I challenge others to talk more openly about merit in judicial selection and particularly whether merit can be defined separately from ideology. If so, then we have to wonder

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84. Amy Goldstein & Neely Tucker, *Bush Plans to Add 2 Judges to Key Court*, WASH. POST, Dec. 15, 2002, at A1; *see also* Jenna Russell, *Harvard Picks First Female Dean of Law*, BOSTON GLOBE, Apr. 4, 2003, at B3.

85. *See* Goldstein & Tucker, *supra* note 84.

why more scholars, Presidents, and Senators do not do so. If not, then we need to explain why our apparent failure to separate merit from ideology ought not to lead us to simply join forces with the social scientists who believe that judges are nothing more than policy-makers who just happen to wear robes.